Court Name: District Court
Division: 1
Receipt Number: 465401076405
Cashier ID: Clapsley
Transaction Date: 09/11/2013
Payer Name: ZAREMBA BROWNELL AND BROWN P
LL

CIVIL FILING FEE
For: ZAREMBA BROWNELL AND BROWN PLL
Amount: $400.00

CHECK
Check/Money Order Num: 11
Amt Tendered: $350.00
CHECK
Check/Money Order Num: 10
Amt Tendered: $50.00

Total Due: $400.00
Total Tendered: $400.00
Change Amt: $0.00

13CV6395(PGG)

13 CIV 6395

JUDGE GARDEPHE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Timothy Connery, individually and on behalf of all others similarly situated, Plaintiff, v. MOTOROLA MOBILITY, INC., and MOTOROLA SOLUTIONS, INC. Defendants.	Civil Action No.: CLASS ACTION COMPLAINT JURY TRIAL DEMANDED

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CLASS ACTION COMPLAINT

Plaintiff Timothy Connery ("Plaintiff"), by his attorneys, brings this class action on behalf of himself and similarly-situated others (the "Class) who purchased Motorola Mobility, LLC's and Motorola Solutions, Inc.'s (collectively, "Motorola" or the "Defendants")[1] MOTOACTV "GPS sports watch" ("MOTOACTV product")[2], and makes the following assertions pursuant to the investigations of counsel and upon information and belief, except as to the assertions specifically pertaining to himself and his counsel, which are based on personal knowledge:

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[1] On August 15, 2011, Google Inc. announced that it had agreed to acquire Motorola Mobility, LLC for $12.5 billion. The merger was completed on May 22, 2012.

[2] Upon information and belief, the MOTOACTV product was discontinued at some point in 2013.

NATURE OF THE ACTION

1. This is a class action against Motorola arising out of the marketing and sale of its MOTOACTV "GPS sports watch" ("MOTOACTV product").[3] Defendants' marketing and promotion of the MOTOACTV product relied on false and misleading claims about durability and suitability of the MOTOACTV product as a wearable fitness performance tracker product designed to be used outdoors and/or during physical activity.

2. Through an extensive, nationwide marketing and advertising campaign, Motorola conveyed the message that its MOTOACTV product is a rugged and durable device that is sweat-proof and rain-resistant.

3. Defendants' representations were false and misleading. The MOTOACTV product is neither sweat-proof nor rain-resistant and thus not suitable to be used as a wearable fitness performance tracker as advertised. When used as instructed, the MOTOACTV product will come into contact with sweat and moisture, causing the product to malfunction.

4. Additionally, despite its representations that the MOTOACTV product is sweat-proof and rain-resistant, Motorola has exhibited a uniform and nationwide policy of routinely denying warranty claims for water damage to the MOTOACTV product resulting from its exposure to sweat and moisture.

5. Plaintiff seeks relief in this action individually, and as a class action on behalf of similarly situated purchasers of the MOTOACTV product for breach of express warranty, for breach of the implied warranty of merchantability, and for violation of the New York false advertising and deceptive trade practices law, N.Y. Gen. Bus. Law § 349, *et seq.*

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[1] The MOTOACTV product came in several memory capacities including 8GB and 16GB models.

THE PARTIES

6. Plaintiff Connery resides in Dobbs Ferry, New York. Plaintiff Connery purchased a 16GB MOTOACTV product at a BestBuy store at 5th Avenue and 44th Street in New York, New York on November 7, 2011 for a purchase price, including tax, of $326.61.

7. Plaintiff Connery saw and read the representations concerning the MOTOACTV product (including the product's label) prior to and at the time of purchase and understood them as a representation and warranty by Motorola that the MOTOACTV was a rugged device that was sweat-proof and rain-resistant. He relied on these representations and warranties in deciding to purchase the MOTOACTV product, and these representations and warranties were part of the basis of the bargain, in that he would not have purchased the MOTROACTV product if he had known that it was not, in fact, sweat-proof and rain-resistant. He also understood that in making the sale, the retailer was acting with the knowledge and approval of Motorola and/or as the agent of Motorola. Plaintiff purchased the MOTOACTV product, and paid a premium over comparable fitness performance tracking products, in reliance on Defendant's promises that MOTOACTV was sweat-proof and rain resistant, as well as the promise that it was fit for use as a wearable fitness performance tracker. Specifically, Plaintiff Connery read and relied upon advertising and online product specifications which indicated it was suitable for this particular use. In return, he received a product that was neither durable nor suitable as a wearable fitness performance tracker product designed to be used outdoors and/or during physical activity and exercise.

8. Plaintiff Connery estimates that he purchased more than $100 in accessories for his MOACTV product, including a watch band and a handle bar mount for his bicycle. In addition, Plaintiff Connery spent an additional $200 on a Garmin device to replace his MOACTV after it malfunctioned due to water damage.

9. Even though Plaintiff Connery used the MOTOACTV as advertised, the product malfunctioned during a cycling workout, apparently caused by perspiration. Thereafter, Plaintiff Connery contacted Motorola customer service in June 2013 and explained the product's malfunction. Motorola informed Plaintiff Connery that he could send the product to the Company's service center where they could "troubleshoot" and repair the device. Plaintiff Connery sent the device to the Company's service center, as advised. Approximately two weeks later, Motorola sent the unrepaired unit back to Plaintiff Connery, along with a small tag of paper which read "water damage, no warranty."

10. Defendant Motorola Mobility LLC is a Delaware corporation with a principal place of business at 600 N. U.S. Highway 45, Libertyville, Illinois 60048.

11. Defendant Motorola Solutions, Inc. is an Illinois corporation with a principal place of business at 1303 East Algonquin Road, Schaumburg, Illinois 60196.

JURISDICTION AND VENUE

12. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1332(d) because there are more than 100 Class members and the aggregate amount in controversy exceeds $5,000,000.00, exclusive of interest, fees, and costs, and at least one Class member is a citizen of a state different from Defendant.

13. This Court has jurisdiction because Plaintiff is a resident of New York and because Defendant is an Illinois corporation (diversity jurisdiction).

14. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391 because Defendant does business throughout this district, and a substantial part of the events giving rise to Plaintiff Connery's claims took place within this judicial District.

FACTS COMMON TO ALL CAUSES OF ACTION

A. Mobile Fitness Device Market

15. In the 1960's various militaries around the world began developing headgear with displays for aviators in combat. Thereafter, companies began experimenting with various forms of wearable devices integrating microchips and sensors. These devices, however, were not only bulky and obtrusive, but they were plagued with a multitude of problems, including technological limitations, power management, and heat dissipation issues.

16. Significant developments in sensor and microelectronic technology as well as advances in material science and battery power have led to a rapidly evolving market for wearables. Furthermore, an increasing number of low-cost sensors available for many different kinds of applications and functionality have only added to the pace. Some of the recent developments in sensors that have become commonplace include movement (via accelerometer), sound, light, electrical potential (via potentiometer), temperature, moisture, location (via GPS), heart rate and heart rate variability, and GSR (galvanic skin response or skin conductivity). Other sensors include ECG/EKG (electrocardiography to record the electrical activity of the heart), EMG (electromyography to measure the electrical activity of muscles), EEG (electroencephalography to read electrical activity along the scalp), and PPG (photoplethysmography to measure blood flow volume).

17. With the growth of sensors and microelectronics, the potential uses of wearable-computing technologies have evolved into the health and fitness market. In fact, ABI Research estimates the market for wearables in health and fitness/sports sectors will grow to nearly 170 million devices by 2017, an annual growth rate of 41%.

B. Defendants Introduce The MOTOACTV Product To Capitalize On Growing Mobile Fitness Market

18. In the fall of 2011, Defendants announced that they were entering the fast growing market for mobile fitness and health devices. Specifically, on October 18, 2011, Motorola issued a press release[4] announcing it was releasing the "WORLD'S FIRST GPA FITNESS TRACKER AND MP3 PLAYER, IN ONE," which it billed as "the Ultimate Fusion of Music and Fitness." The device, a wearable fitness performance tracker product, or "GPS sports watch" known as the MOTOACTV was directly marketed towards the outdoor segment of consumers seeking to wear the product while exercising or working out. According to the press release:

> Scorch more calories, shatter personal records and train even harder with MOTOACTV™, the new fitness device from Motorola, Inc. (NYSE:MMI). MOTOACTV is a lightweight, wearable fitness performance tracker and smart music player in one. Sync MOTOACTV with your PC, so you can check out the music you perform to best or track your workouts over extended time periods, set goals and even create workout competitions with your friends via the MOTOACTV Web Portal.
>
> ***
>
> Run. Ride. Jam
> Heart pumping, thighs burning and five laps to go. You need a serious soundtrack to get you through. MOTOACTV can rock up to 4,000 of your favorite songs while tracking your every move, from the Rockies to the gym. Ultra-portable, you choose the way you want to wear MOTOACTV: strap it on your wrist or arm, clip it to your shirt or mount it on your bike during an outdoor ride.

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[4] *An archived text version of the press release is available at: http://www.thefreelibrary.com/Motorola+Mobility+Unveils+MOTOACTV(TM) +-+The+Ultimate+Fusion+of+Music...-a0270063133 (last accessed August 27, 2013).*

19. Moreover, to reinforce this perception, Defendants' press release touted that the MOTOACTV product was "sweat-proof" and "rain-resistant." According to the October 18, 2011, press release[5]:

> **MOTOACTV will rock your fitness goals with the following features:**
>
> - Sports a 1.6" full-color touch-screen display that is sweat-proof, rain-resistant and scratch-resistant Corning® Gorilla® Glass that auto-adjusts for indoor or outdoor lighting

20. Moreover, the "Fact Sheet" accompanying the October 18, 2011 initial press release[6] stated:

> Feel the burn and the beat with MOTOACTV™, a cutting-edge GPS fitness tracker, heart rate monitor-enabled* and smart music player packed into a small, sweat proof and stylish device.
>
> ***
>
> Designed for Champions
> Breaking a sweat? Don't worry about it. MOTOACTV is sweat-proof, rain-resistant and features a scratch-resistant Corning® Gorilla® Glass display so you can work out anywhere.

21. The MOTOACTV product, which was offered in 8G and 16G memory capacity versions, was initially available online at www.motorola.com, Amazon.com, Bestbuy.com®, REI.com and SportsAuthority.com and at the following national retailers Best Buy®, Eastern Mountain Sports, REI, The Sports Authority. Moreover, at time of its initial product offering, the manufacturer's suggested retail price ("MSRP") was $249 for 8G model and $299 for 16G model. Furthermore, Motorola offered the SF700 and Motorola SF500 sports headphones, sold separately at $149 and $99 MSRP respectively.

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[5] *Id.*

[6] *An archived text version of the fact sheet is available at: http://archive-com.com/page/1288190/2013-02-01/http://mediacenter.motorola.com/Fact-Sheets/MOTOACTV-Fact-Sheet-3870.aspx (last accessed August 27, 2013).*

C. Defendants' False and Misleading Advertising Campaign

22. Defendants have engaged in a massive, uniform marketing and advertising campaign designed to convince consumers that the MOTOACTV product is a rugged, durable device that is "sweat-proof" and "rain-resistant." This long-term campaign, which occurred over several years and several forms of media, involved the dissemination of materially false and misleading statements which represent, both expressly and by implication, that the MOTOACTV is "sweat-proof" and "rain-resistant."

23. Furthermore, Defendants' false statements about the MOTOACTV product's ability to not be damaged by sweat or moisture also amounts to a false and misleading promise that the MOTOACTV product is fit for use as a wearable fitness performance tracker during physical activity and in various climates.

24. Defendants' MOTOACTV packaging, television advertisements, and Internet sites are replete with false and misleading statements about the nature, characteristics, and qualities of the MOTOACTV product. Specifically, Defendants repeatedly make claims that the MOTOACTV product is not only "rugged", but more specifically "sweat proof" and "rain resistant."

25. For example, MOTOACTV's packaging label prominently states that the MOTOACTV is "Sweat-Proof."

26. Furthermore, the MOTOACTV's package label also includes a false and misleading graphic showing a running figure on the screen of the product, indicating that the MOTOACTV device is intended for use during a workout, where sweating is virtually guaranteed. These misrepresentations are visible on the product packaging below:

8 GB
MOTOACTV
FITNESS TRACKER + GPS
SMART MUSIC PLAYER
SWEAT PROOF

27. Similarly, Defendants have featured these false and misleading representations in television and online commercials. For example, Defendants produced a one minute, forty-four second video advertisement for the MOTOACTV product that makes false and misleading representations about the product's durability[7] and suitability as a wearable fitness performance tracker. The commercial, marketed to towards consumers who want to use and wear the product while exercising, repeatedly represents that the device is designed to be worn and used while

exercising. The MOTOACTV commercial is replete with images of sweaty athletes and/or actors working out while wearing the MOTOACTV product.

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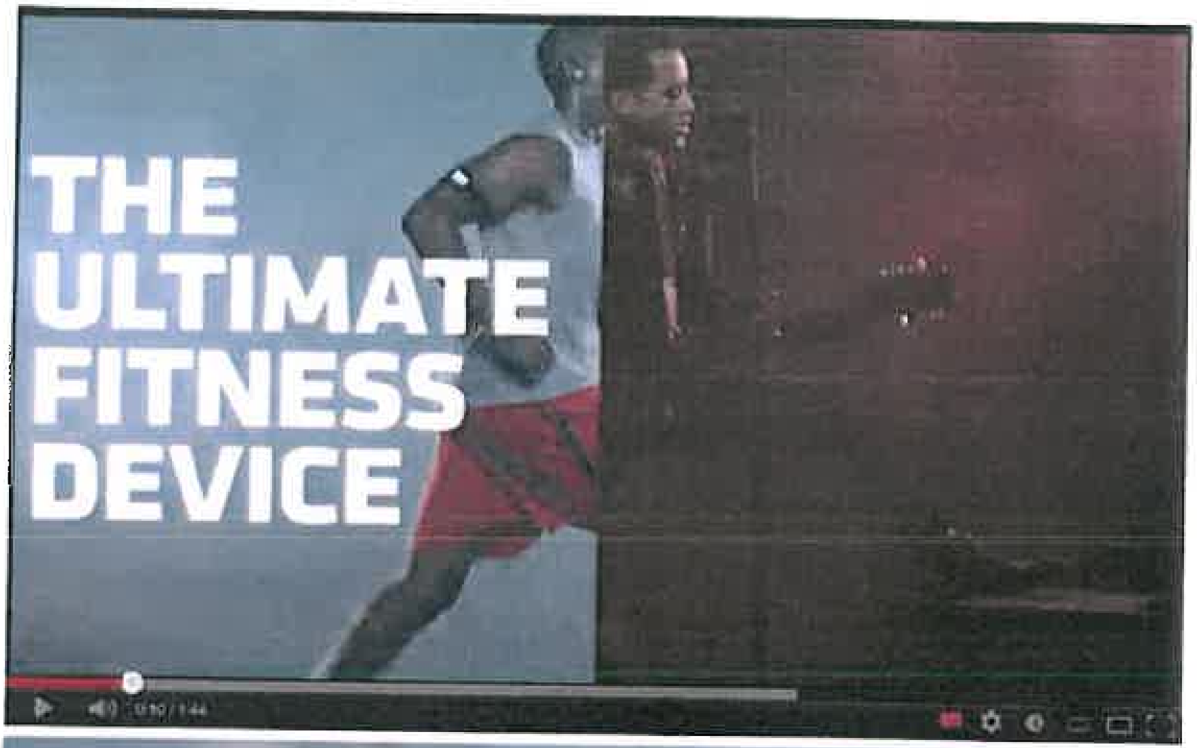
[7] The ad was originally available at: http://www.youtube.com/watch?feature=player_embedded&v=C3SIbokHetQ. As of August 26, 2013, the video is no longer available at that address, but the same video can be accessed at: http://www.youtube.com/watch?v=Na7O0mL4_w0 (last accessed August 26, 2013).


THE
ULTIMATE
FITNESS
DEVICE

RUGGED
DESIGN
FOR
MULTIPLE
SPORTS

28. The commercial prominently states that the MOTOACTV product is "***SWEAT PROOF***," "SHOCK PROOF," and "SCRATCH RESISTANT." (emphasis added)

SWEAT
PROOF
SHOCK
PROOF
SCRATCH
RESISTANT
Treadmill
Elliptical
Step Machine

29. Furthermore, Motorola's deceptive and misleading marketing campaign includes misrepresentations made on billboards and in retailer advertisements, including retailers' websites.

30. Motorola uses a series of billboards to advertise the MOTOACTV product, depicting famous entertainers side-by-side with sweaty athletes. For example, a billboard in New York depicts Gene Simmons from the band *KISS* side-by-side with a sweaty cyclist:

MOTOACTV
THE ULTIMATE FUSION
OF MUSIC AND FITNESS.

31. Another billboard in New York depicts guitarist Slash next to a sweaty boxer athlete

32. National retailers utilize the same promotional materials on their websites. For example, Best Buy's webpage dedicated to the MOTOACTV product[1] contained the same image of rock guitarist Slash and a sweaty athlete, highlighting prominent features including that the product is "Sweat proof, rain resistant and shock proof":

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[8]*Best Buy originally hosted its MOTOACTV site at: http://www.bestbuy.com/site/olstemplatemapper.jsp?id=pcat17080&type=page&qp=cpcmcat242800050021%23%23-1%23%23-1~~q70726f63657373696e6774696d653a3e313930302d30312d3031~~nf1151%7C%7C4d6f746f726f6c61&list=y&nrp=15&sc=HealthFitnessSP&sp=-bestsellingsort+skuid&usc=pcmcat242800050021 (inactive as of Aug. 27, 2013).*

MOTOROLA
MOTOACTV
THE ULTIMATE FUSION OF MUSIC AND FITNESS.
Progress tracker

33. Additionally, Motorola advertised MOTOACTV on the Internet at https://motoactv.com/ and http://www.motorola.com/us/consumers/8GB-or-16GB-MOTOACTV/79070,en_US,pd.html. The websites contained multiple representations that MOTOACTV is sweat-proof, rain-resistant, and fit for use as a wearable fitness performance tracker. For example, in the "Our Technology" section of the MOTOACTV website,[9] Motorola stated:

> Who wants to futz with confusing controls? MOTOACTV's touch screen display is totally clear, indoors and out. And the MOTOACTV device is built for your toughest training, so it's sweat proof, rain resistant, and scratch resistant - just like you.

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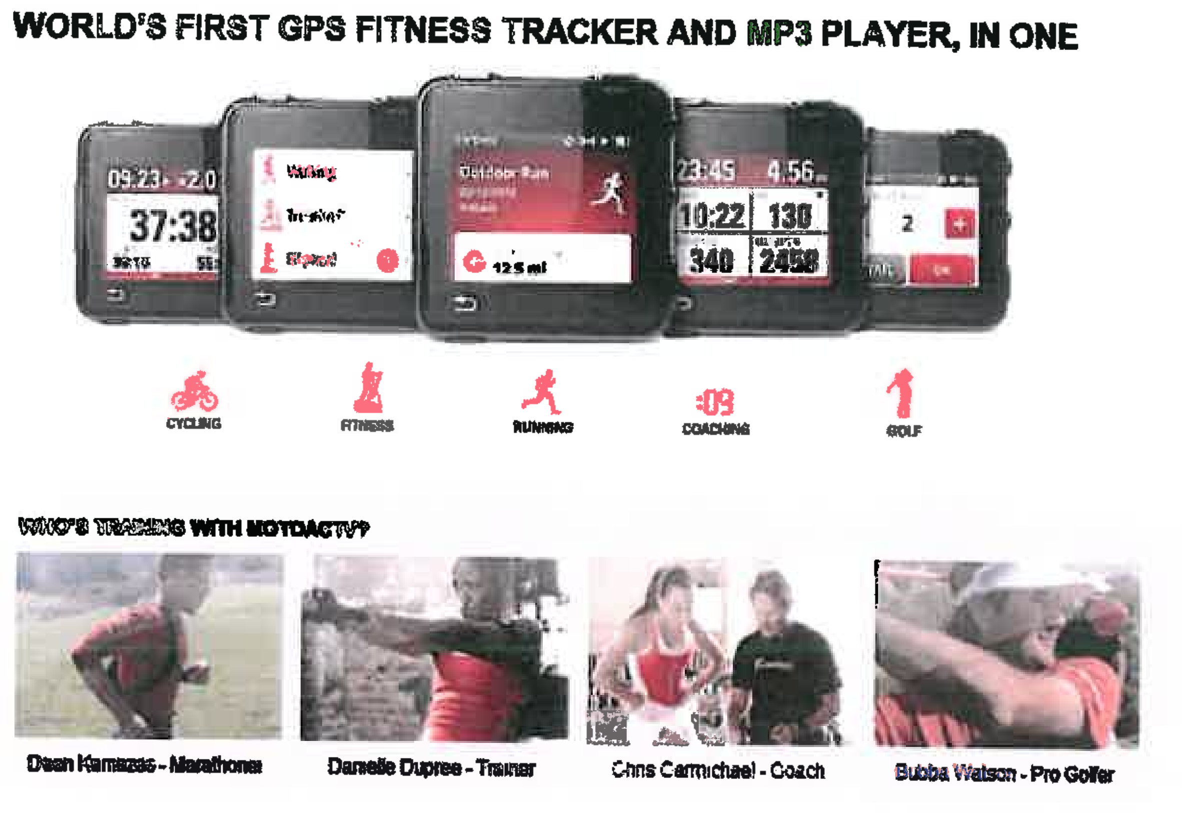
[9] *See* https://motoactv.com/default/ourtechnology.ftl (last accessed August 26, 2013).

34. Motorola's website represented that the MOTOACTV product is fit for use as a wearable fitness performance tracker for several activities including cycling, fitness, running, coaching and golf, and depicted athletes wearing the MOTOACTV while exercising.[10]


WORLD'S FIRST GPS FITNESS TRACKER AND MP3 PLAYER, IN ONE
37:38
10:22
130
340
2458
CYCLING
FITNESS
RUNNING
COACHING
GOLF
WHO'S TRAINING WITH MOTOACTV?
Dean Karnazes - Marathoner
Danielle Dupree - Trainer
Chris Carmichael - Coach
Bubba Watson - Pro Golfer

35. Another Motorola website depicted celebrities using the MOTOACTV while exercising.[11]

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[10] *See* https://motoactv.com/home/page/activities.html (last accessed on August 27, 2013).

[11] *See* http://www.motorola.com/us/consumers/8GB-or-16GB-MOTOACTV/79070,en_US,pd.html?selectedTab=tab-4&cgid=fitness-devices#tab (last accessed on August 1, 2013).

36. Moreover, on the specifications or "Specs" tabs of the MOTOACTV websites, Motorola states the product is "rain resistant" and "sweat-proof." [12]

37. However, the claim that that MOTOACTV is "sweat-proof" and "rain resistant," is false and misleading. Exposing the MOTOACTV product to sweat or moisture in the exact manner as advertised, causes the device to malfunction and renders it useless.

38. Plaintiff Connery's experience illustrates the falsity of Defendants' claims. Connery's MOTOACTV device was used as directed (worn during an exercise session) and malfunctioned after coming into contact with sweat.

39. Indeed, multiple complaints on consumer websites and on Motorola's website describe similar experiences of sweat damaging the MOTOACTV product. For example, the following complaints appear on internet web sites regarding the MOTOACTV:

> My Motoactv doesn't seem to be sweat proof. The headphone jack is now dead and when sweat rolls off my face on the face of the unit it will changes displays and will not allow me to change it back. Is this normal? **[13]

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[12] *See* https://motoactv.com/home/page/specs.html and http://www.motorola.com/us/consumers/8GB-or-16GB-MOTOACTV/79070,en_US,pd.html?selectedTab=tab-2&cgid=fitness-devices#tab (last accessed on August 1, 2013).

[13] See https://forums.motorola.com/posts/5d850d2f76 (last accessed August 1, 2013).

Another consumer wrote:

> A few months ago my Motoactv stopped working. I sent it in for repair. It was not warrantied/fixed due to "liquid damage".**[14]

Another consumer wrote:

> **After several calls to Motorola's support line (totaling about four hours at least), I was directed to send in the device. Today, I received an email from their support team advising the device was damaged by water and could not be repaired. ** I don't particularly understand how I could have subjected the Motoactv to water damage. When I used it outside on my runs, it was always precipitation-free except for one day when it rained lightly. It was hot in Virginia during these days so I did get sweaty but not ridiculously so. I never used it as a MP3 player on a run so I never removed the headphone plug and made sure the USB seal was tight.** [15]

Another consumer wrote:

> I bought my Motoactv in January 2012. Since then I've been using it lightly for running and biking. ** A couple of weeks ago I noticed that the accelerometer was not working. I could not wake up the device shaking my wrist and the tap wouldn't read the metrics while working out. I decided to send it to repair since I was still under warranty. **Well, turns out that the device has liquid damage and they returned it unrepaired. I have never put the Motoactv in contact with water. **So, basically, they are selling a fitness device that is not designed to withstand sweat while working out. GREAT.**[16]

Another consumer wrote:

> I purchased my Motoactv at the end of March. I saw it on display at a 10k race in Florida. Stopped by Best Buy on the way home and bought it. Started using it for a couple runs a week. Noticed a few glitches here and there but, overall I was pretty satisfied with the product. Then, about a month ago the device on/off button stopped working. I finally got around to sending it in for repair. Got it back today - unrepaired. Motorola is citing liquid damage as the reason for invalidating warranty. I am blown away that this "cutting edge fitness device" is so easily damaged by liquid. I sweat quite a bit (Florida is hot/humid) and have gotten caught in the rain a couple times, but have never had the device in a body of water. In the letter the warranty department sent me it states they do not recommend continued use of the device. Well, I will take [their] advice a go back to using my Garmin! No more Motorola products for me. If you are still inclined

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14 See https://forums.motorola.com/posts/6077c20c41 (last accessed August 1, 2013).

15 See https://forums.motorola.com/posts/e4f561728e (last accessed August 1, 2013).

16 See. https://forums.motorola.com/posts/841f08cf4c (last accessed August 1, 2013).

to buy a Motoactv, do yourself a favor and purchase the stores warranty/insurance or just make sure you take it easy on your runs so you don't sweat. [17]

Another consumer wrote:

> I have been using my new MotoActv 8GB GPS-enabled device a lot and enjoyed it very much. I run 4-5 times per week and have found it to be a great tool for my training. However, I'm sorry to say I can no longer endorse the product. In fact, do not buy it! I've had the device for about 6 months and then it started acting strangely. After several weeks, it would no longer charge (the battery would get very hot when charging) and then it just stopped working altogether.
>
> I contacted Motorola customer service and returned the device for repair. To my utter amazement, I've just been informed that it will not be repaired or replaced because it "suffered liquid damage" which voids the warranty. Moto advertises (on their website, no less) that this device is rain resistant and sweat resistant. I have only used the device for running. It has gotten wet from sweat (i.e. wearing it on my wrist) and perhaps once in light rain. I always kept the plugs in place for the headphone jack and mini-USB. In no case was it ever submerged in water. The device is meant for use while exercising - if it cannot handle some exposure to moisture, then the DESIGN of the device is defective. I feel I am owed a refund for this product. But, Motorola is refusing to replace the device. This is baffling to me. Their response is the worst example of terrible customer service I have ever experienced.[18]

Another consumer wrote:

> **I used it on 7 runs, with no rain, and always used grommet in the headphone jack when the headphones weren't connected. It stopped coming on. When I sent it back, this "NEW" unit is supposedly liquid damage and is not being replaced or repaired.**[19]

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[17] *See* https://forums.motorola.com/posts/c4836f75f2 (last accessed August 1, 2013).

[18] *See* http://www.amazon.com/review/R2V1VU79BXBJ0K/ref=cm_cr_rdp_perm?ie=UTF8&ASIN=B005Q3144W&linkCode=&nodeID=&tag= (last accessed on August 1, 2013).

[19] *See* https://forums.motorola.com/posts/490b24e91d?commentId=641361#641361 (last accessed on August 1, 2013).

[20] *See* https://forums.motorola.com/comment/655670 (last accessed August 1, 2013).

[21] *See* https://forums.motorola.com/posts/93855c54b3 (last accessed August 1, 2013).

[22] *See* http://www.amazon.com/review/R3D9ZEEQ3JUZQJ/ref=cm_cr_pr_perm?ie=UTF8&ASIN=B005Q3144W&linkCode=&nodeID=&tag= (last accessed on August 1, 2013).

Another consumer wrote:

> I sent mine in for repair over a week ago because the workout button stopped working. I NEVER had mine out in the rain once. Closest it has ever gotten near to water was when I would wash my hands. Just got the e-mail saying it had liquid damage and it isn't covered**[20]

Another consumer wrote:

> Has anyone had their motoactv unit replaced after it receiving "liquid damage"? I am curious because Motorola touts the units being "sweatproof" in the manual, yet after getting a considerable amount of sweat on mine I found mine to stop working. I wouldn't call this sweatproof, and it sounds like a lot of other customers are having problems even with light rain killing their watches. I've already received mine back from tech support saying that this voids the warranty and I'm out of luck, which is incredibly frustrating. I now have a $200 paperweight that I was able to use for about a month before it stopped working.[21]

Another consumer wrote:

> I've had my Motoactv for about four months. Unfortunately, after a recent run with copious perspiration, it stopped working. It simply would no longer turn on. After repeated e-mails and phone calls to Motorola I was able to get an RMA number for its return. Unfortunately, Motorola decided that it was not repairable and not covered by the warranty; moisture damage.**[22]

Another consumer wrote:

> ** I paid the full retail back when it was $250. I'm not a rich man (still in college) and this is the most expensive thing I was allowing myself to buy for the year. As such, I planned on taking great care of it, because 250 is a huge investment for me. ** The workout button stopped working a few weeks ago, so motorola asked me to send it to them for repair. After over a week of them holding it, they opened it up and discovered that it had liquid damage. I am not a sweaty man by many standards. I barely drip during a half marathon. To be told that it had liquid damage blew my mind!!! They sent the broken unit back to me to dispose of. ** Apparently it's not sweat proof regardless of if you use the grommet or the usb cover, and they won't cover the damage under warranty. The product says it is sweat proof. The head of motoactv forums assured me (in my previous review) that this product could handle light rain and sweat no problem as long as you use the headphone grommet and usb cover ...well it didn't. Now I'm out $250 plus the wrist band and bike senors I purchased ... Plus I gotta find a new gps to keep up with my marathon training.[23]

40. Yet, after receiving a significant number of complaints from purchasers of MOTOACTV products, describing similar problems, Defendants have refused to disclose or correct the misrepresentations and/or problems.

41. Moreover, despite knowing and being fully aware of the misrepresentations, Defendants omitted and/or concealed the moisture issue from unsuspecting MOTOACTV purchasers at the time of sale and did not repair or upgrade the MOTOACTV units to correct the misrepresentations.

42. Defendants' false and misleading claims are in willful and wanton disregard of the interests of the consuming public, and constitute a knowing attempt by Defendants to deceive consumers.

43. Furthermore, not only is the MOTOACTV product not sweat-proof or rain resistant, and thus not fit for its advertised use, but exposing the MOTOACTV to sweat or rain excludes the product from coverage under Motorola's limited warranty.

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[23] *See* http://www.amazon.com/review/R5SKOB6QPYOBI/ref=cm_cr_pr_perm?ie=UTF8&ASIN=B005Q3144W&linkCode=&nodeID=&tag= (last accessed August 1, 2013).

D. Motorola's Uniform and Nationwide Policy of Routinely Denying Class Members Their Bargained-For Warranty Rights

44. Motorola has established a uniform and nationwide policy of routinely denying all warranty claims when the MOTOACTV product malfunctions after it is exposed to sweat or rain.

45. Defendants claim that MOTOACTV is "sweat-proof," "rain-resistant" and that it is an effective "lightweight, wearable fitness performance tracker and smart music player in one." Defendants makes an express written warranty that the MOTOACTV product will be free from defects in materials and workmanship under normal consumer usage for one year after

purchase. However, Motorola routinely denies consumers warranty coverage for MOTOACTV devices that malfunction after coming into contact with sweat.

46. Motorola fails to disclose to consumers prior to their purchasing a MOTOACTV device that Motorola's uniform and nationwide policy is to exclude the product from coverage under Motorola's limited warranty because exposure to sweat is defined therein as "Abuse & Misuse."

47. This information is not disclosed to consumers until after they purchase the MOTOACTV product. Buried in the back of the product's user manual, is a warning against using MOTOACTV in precisely the manner it is advertised.[24] Specifically, in the troubleshooting section, under the heading "Use & Care," there is a warning to keep the MOTOACTV device from "liquids of any kind," and to not expose the MOTOACTV device "to water, rain, extreme humidity, **sweat**, or other moisture" (emphasis added). Moreover, in listing exclusions to the limited warranty, MOTOACTV's user manual characterizes "contact with liquid, water, rain, extreme humidity or heavy perspiration..." as "Abuse & Misuse."

Use & Care

To care for your Motorola product, please keep it away from:

liquids of any kind

Don't expose your product to water, rain, extreme humidity, sweat, or other moisture. If it does get wet, don't try to accelerate drying with the use of an oven or dryer, as this may damage the product.

Exclusions (Products and Accessories)

Normal Wear and Tear. Periodic maintenance, repair and replacement of parts due to normal wear and tear are excluded from coverage.

Batteries. Only batteries whose fully charged capacity falls below 80% of their rated capacity and batteries that leak are covered by this limited warranty.

Abuse & Misuse. Defects or damage that result from: (a) improper operation, storage, misuse or abuse, accident or neglect, such as physical damage (cracks, scratches, etc.) to the surface of the product resulting from misuse; (b) contact with liquid, water, rain, extreme humidity or heavy perspiration, sand, dirt or the like, extreme heat, or food; (c) use of the Products or Accessories for commercial purposes or subjecting the Product or Accessory to **abnormal usage or conditions; or (d) other acts which are not the fault of Motorola, are excluded from coverage.**

48. Indeed, Motorola has refused to refund, repair, or replace Plaintiff and Class members' MOTOACTV products once they have been damaged by exposure to sweat.

49. In fact, Plaintiff Connery sought a refund, repair, or replacement for his purchase of a MOTOACTV product pursuant to Motorola's limited warranty, after the product malfunctioned after a light exercise routine. Specifically, Plaintiff returned the MOTOACTV product to Motorola in June 2013 however, Defendants refused to refund, repair or replace the defective MOTOACTV device, citing water damage resulting from the product's exposure to Plaintiff's sweat while exercising.

50. Moreover, as seen in the above-cited consumer complaints, internet message boards are replete with complaints illustrating that Motorola routinely denies purchasers of the defective MOTOACTV devices warranty coverage because the device has come into contact with water. *See supra* ¶ 36.

E. Defendants' False and Misleading Claims are Material

51. The representations at issue were ubiquitous. On billboards, commercial videos, in retail stores, on their respective internet websites, and on Defendants' website, Motorola made the same representations about the MOTOACTV product, namely that the MOTOACTV product is sweat-proof, rain-resistant and fit for use as a wearable fitness performance tracker. Moreover, every package of the product contains these representations.

52. All of Defendants' claims challenged herein relate to matters that are material and important to a consumer's purchasing decision, as they concern core claims about the product which are likely to and did influence consumers' purchase of the MOTOACTV product.

53. Defendants' marketing, advertising, and packaging materials intended to, and did, induce Plaintiff and members of the Class to rely upon Defendants' representations that MOTOACTV was effective for its intended use, and in the way described. These representations were a substantial factor in causing Plaintiff and members of the Class to purchase the MOTOACTV product at a significant price increase instead of comparable GPS sports watches or wearable fitness performance trackers.

54. At the time Plaintiff and members of the Class purchased the MOTOACTV device, they were unaware of the fact that: (1) MOTOACTV was neither sweat-proof nor rain-resistant; (2) MOTOACTV was not fit for use as a wearable fitness performance tracker; and (3) using MOTOACTV for its intended use, and in the exact way as advertised by Motorola, caused MOTOACTV to not be covered by Motorola's limited warranty.

CLASS ACTION ALLEGATIONS

55. Plaintiff brings this action on behalf of himself and all other similarly situated New York residents pursuant to Rule 23(a), (b)(2), and (b)(3) of the Federal Rules of Civil Procedure and seeks certification of the following Class: all consumers and entities who, within the applicable statute of limitations period, purchased the MOTOACTV product. Excluded from the Class are Motorola, its parents, subsidiaries, affiliates, officers and directors, and those who purchased these products for resale.

56. The members of the Class are so numerous that joinder of all members of the Class is impracticable. Plaintiff is informed and believes that the proposed Class contains thousands of purchasers of the Products who have been damaged by Motorola's conduct as alleged herein. The precise number of Class members is unknown to Plaintiff.

57. This action involves common questions of law and fact, which predominate over any questions affecting individual Class members. These common legal and factual questions include, but are not limited to, the following:

(1) whether the claims discussed above are true, or are misleading, or objectively reasonably likely to deceive;

(2) whether Motorola's conduct violates public policy;

(3) whether the conduct constitutes violations of the laws asserted;

(4) whether Motorola engaged in false or misleading advertising;

(5) whether Plaintiff and Class members have sustained monetary loss and the proper measure of that loss; and

(6) whether Plaintiff and Class members are entitled to other appropriate remedies, including corrective advertising and injunctive relief.

2. Plaintiff's claims are typical of the claims of the members of the Class because, *inter alia*, all Class members were injured through the uniform misconduct described above having been exposed to Motorola's false representations regarding the efficacy of MOTOACTV. Plaintiff is advancing the same claims and legal theories on behalf of himself and all members of the Class.

3. Plaintiff will fairly and adequately protect the interests of the members of the Class, has retained counsel experienced in complex consumer class action litigation, and intends to prosecute this action vigorously. Plaintiff has no adverse or antagonistic interests to those of the Class.

4. A class action is superior to all other available means for the fair and efficient adjudication of this controversy. The damages or other financial detriment suffered by individual Class members is relatively small compared to the burden and expense that would be entailed by individual litigation of their claims against Motorola. It would thus be virtually impossible for the Class, on an individual basis, to obtain effective redress for the wrongs done to them. Individualized litigation would create the danger of inconsistent or contradictory judgments arising from the same set of facts and would also increase the delay and expense to all parties and the courts. By contrast, the class action device provides the benefits of adjudication of these issues in a single proceeding, ensures economies of scale and comprehensive supervision by a single court, and presents no unusual management difficulties under the circumstances here.

5. Plaintiff seeks preliminary and permanent injunctive and equitable relief on behalf of the entire Class, preventing Motorola from further engaging in the acts described and requiring Motorola to provide full restitution to Plaintiff and Class members.

6. Unless a Class is certified, Motorola will retain monies received as a result of its conduct that were taken from Plaintiff and Class members. Unless a Class-wide injunction is issued, Motorola will continue to commit the violations alleged, and the members of the Class and the general public will continue to be deceived.

7. Motorola has acted and refused to act on grounds generally applicable to the Class, making appropriate final injunctive relief with respect to the Class as a whole.

8. Motorola has acted and refused to act on grounds generally applicable to the Class, making appropriate final injunctive relief with respect to the Class as a whole.

COUNT I
(For Breach of Express Warranty)

58. Plaintiff repeats the allegations contained in the above paragraphs as if fully set forth herein.

59. Plaintiff brings this Count individually and on behalf of the members of the Class against Defendants.

60. Defendants expressly warranted through advertisements, online marketing, and the product packaging and labeling that MOTOACTV is sweat-proof and rain-resistant.

61. Defendants' warranty was expressly disclosed to Plaintiff and Class members on the product packaging and in advertisements and promotional materials. Plaintiff and Class members purchased the MOTOACTV device based upon the above said express warranties. Plaintiff and Class members relied on the truthfulness of the express warranties asserted by Defendants in deciding to purchase MOTOACTV product.

62. Defendant expressly warranted its goods to the ultimate consumers and the express warranties were the basis of the bargain.

63. Defendants breached their express warranties by selling a product that is not sweat-proof or rain-resistant.

64. As a direct and proximate result of Defendants' breach of its express warranty, Plaintiff and the Class Members were injured because: (a) they would not have purchased MOTOACTV on the same terms if the true facts concerning MOTOACTV's actual abilities to be sweat-proof and rain-resistant had been known; (b) they paid a price premium due to the misrepresentation of MOTOACTV's abilities to be sweat-proof and rain-resistant; and (c) MOTOACTV is not sweat-proof or rain-resistant as promised.

COUNT II
(For Breach Of Implied Warranty of Merchantability)

65. Plaintiff and Class members repeat and reallege each and every allegation above, as if set forth in full herein.

66. Plaintiff brings this Count individually and on behalf of the members of the Class against Defendants.

67. Defendants, as the designers, manufacturers, marketers, distributors, and/or sellers impliedly warranted through advertisements and online marketing that MOTOACTV was fit for its intended purpose in that MOTOACTV is a sweat-proof, rain-resistant wearable fitness performance tracker. Defendants did so with the intent to induce Plaintiff and members of the Class to purchase the product.

68. Defendants breached their implied warranties in the contract for the sale of MOTOACTV in that MOTOACTV could not pass without objection in the trade under the contract description, the goods were not of fair average quality within the description, and the

goods were unfit for their intended and ordinary purpose. As a result, Plaintiff and Class members did not receive the goods as impliedly warranted by Defendants to be merchantable.

69. In reliance upon Defendants' skill and judgment and the implied warranties discussed above, Plaintiff and Class members purchased MOTOACTV for use as a wearable fitness performance tracker to wear while exercising.

70. The MOTOACTV products were not altered by Plaintiff or Class members.

71. The MOTOACTV products were defective when they left the exclusive control of Defendants.

72. Defendant knew that MOTOACTV would be purchased and used without additional testing for efficacy by Plaintiff and Class members.

73. The MOTOACTV product was defectively designed and unfit for its intended purpose, and Plaintiff did not receive the goods as warranted. Had Plaintiff and the members of the Class known the true facts, they would not have purchased the MOTOACTV product on the same terms.

74. Plaintiff and Class members were injured as a direct and proximate result of Defendants' breach because (a) they would not have purchased MOTOACTV on the same terms if the true facts concerning MOTOACTV's actual abilities to be sweat-proof and rain-resistant had been known; (b) they paid a price premium due to the misrepresentation of MOTOACTV's abilities to be sweat-proof and rain-resistant; and (c) MOTOACTV is not sweat-proof, rain-resistant, nor fit for use as a wearable fitness tracker.

COUNT III
(Violation of New York Gen Bus. Law § 349)

75. Plaintiff repeats the allegations contained in the above paragraphs as if fully set forth herein.

76. Plaintiff brings this claim individually and on behalf of the members of the Class against Defendants.

77. This count is predicated on allegations of deceptive conduct, and not on any allegation of fraud or fraudulent conduct.

78. By the acts and conduct alleged herein, Defendants committed unfair or deceptive acts and practices by making the Misrepresentations.

79. The foregoing deceptive acts and practices were directed at consumers.

80. The foregoing deceptive acts and practices are misleading in a material way because they fundamentally misrepresent the characteristics of the MOTOACTV to induce consumers to purchase same.

81. Plaintiff and the members of the Class were harmed by Defendants' deceptive conduct as described herein.

82. On behalf of himself and other members of the Class, Plaintiff seeks to enjoin the unlawful acts and practices described herein, to recover their actual damages or fifty dollars, whichever is greater, three times actual damages, and reasonable attorneys' fees.

COUNT IV
(False Advertising, New York Gen Bus. Law § 350)

83. Plaintiff repeats the allegations in the foregoing paragraphs as if fully set forth herein.

84. Plaintiff brings this Count individually and on behalf of the members of the Class against Defendants.

85. Based on the foregoing, Defendants have engaged in consumer-oriented conduct that is deceptive or misleading in a material way which constitutes false advertising in violation of Section 350 of the New York General Business Law.

86. Defendants' false, misleading and deceptive statements and representations of fact, including but not limited to the Misrepresentations, were and are directed to consumers.

87. Defendants' false, misleading and deceptive statements and representations of fact, including but not limited to the Misrepresentations, were and are likely to mislead a reasonable consumer acting reasonably under the circumstances.

88. Defendants' false, misleading and deceptive statements and representations of fact, including but not limited to the Misrepresentations, have resulted in consumer injury or harm to the public interest.

89. As a result of Defendants' false, misleading and deceptive statements and representations of fact, including but not limited to the Misrepresentations, Plaintiff has suffered and continue to suffer economic injury.

90. Plaintiff and the Class members suffered an ascertainable loss caused by Defendants' misrepresentations because they paid for the MOTOACTV, which they would not have done had they known the truth about the MOTOACTV.

91. On behalf of himself and other members of the Class, Plaintiff seeks to enjoin the unlawful acts and practices described herein, to recover their actual damages or five hundred dollars, whichever is greater, three times actual damages, and reasonable attorneys' fees.

WHEREFORE, Plaintiff, individually and on behalf of all others similarly situated, seeks judgment against Motorola, as follows:

A. For an order certifying the Class under Rule 23 of the Federal Rules of Civil Procedure and naming Plaintiff Connery as Class Representative and her attorneys as Class Counsel to represent the Class members;

B. For an order declaring that Motorola's conduct violates the statutes referenced herein;

C. For an order finding in favor of the Plaintiff and the Class on all counts asserted herein;

D. For an order awarding compensatory, treble, and/or punitive damages in amounts to be determined by the Court and/or jury;

E. For prejudgment interest on all amounts awarded;

F. For an order of restitution and all other forms of equitable monetary relief;

G. For injunctive relief as pleaded or as the Court may deem proper; and

H. For an order awarding Plaintiff, the Class their reasonable attorneys' fees and expenses and costs of suit.

JURY DEMAND

Plaintiff hereby demands a trial by jury on all claims so triable in this action.

Dated: September 10, 2013

Respectfully submitted,

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